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No. 132

# Supreme Court of the United States

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

*Petitioners,*

*against*

ALLAN P. KIRBY, CHARLES T. IRELAND, JR., FRED M. KIRBY and ALLEGHANY CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF RESPONDENT FRED M. KIRBY

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## BRIEF OF RESPONDENT FRED M. KIRBY

### Question Presented

No question has been presented to this Court which justifies the continuation of Fred M. Kirby as a defendant.

### Statement of Facts

On October 7, 1960, the Executive Committee of the Board of Directors of Alleghany, of which Fred M. Kirby was a member, authorized (Pl. Ex. 396, R. 1364) the officers of Alleghany "to contest and defend" *Murchison et al* v. *Kirby et al.*, (U. S. Dist. Ct., S.D.N.Y. 60 Civ. 3511) (*"Murchison"*). *Murchison* was tried before Judge Dawson and was dismissed.

## Argument

At the opening of the trial in *Murchison,* the "Proposed Statement of Issues" (R. 336) submitted by plaintiff was adopted by the court as the definitive statement of issues to be tried (R. 344). Only one of the proposed issues charged wrongdoing on the part of Fred M. Kirby:

> "9. Where Alleghany has been caused by Kirby and Fred M. Kirby to expend monies in payment of legal fees and disbursements on Kirby's behalf and that of others than Alleghany and failed to disclose said payments to the shareholders of Alleghany, should Kirby and Fred M. Kirby be compelled to repay said sums to Alleghany?" (R. 338)

The trial court found, as a matter of fact, that no case had been made out on the only issue involving Fred M. Kirby. In dismissing *Murchison,* Judge Dawson stated:

> "There has been a complete lack of proof sufficient to warrant any direction that defendants Kirby, Ireland and Fred M. Kirby reimburse Alleghany for legal fees and expenses." (R. 2327)

While it was not necessary for Judge Dawson to reach the legal question involved, there is no doubt that the action of the Executive Committee of Alleghany was entirely justified.

*Oshrin* v. *Celanese Corporation,* 37 N.Y.S. 2d 548 (Sup. Ct. N. Y. Co. 1942), *aff'd,* 265 App. Div. 923, 39 N.Y.S. 2d 984 (1st Dep't 1942), *aff'd,* 291 N. Y. 170, 51 N.E. 2d 694 (1943);

*Godley* v. *Crandall & Godley Co.,* 181 App. Div. 75, 168 N. Y. Supp. 251 (1st Dep't 1917), *aff'd,* 227 N. Y. 656, 126 N.E. 908 (1920);

*Blish* v. *Thompson Automatic Arms Corp.*, 30 Del. Ch. 538, 64 A. 2d 581 (1948);
*Hornsby* v. *Lohmeyer*, 364 Pa. 271, 72 A. 2d 294 (1950).

The inclusion of Fred Kirby in this case and the refusal by counsel for petitioners to discontinue his prosecution represent a continuation of the proxy-fight strategy which gave birth to the Murchison suit in the first instance. The bad faith in which this proceeding has been prosecuted is evidenced by the fact that not only is no issue posed as to Fred M. Kirby, but his name is not even mentioned, except in the caption, either in the Petition for a Writ of Certiorari or in petitioners' brief.

It is submitted that the final dismissal of this suit as to Fred M. Kirby is long overdue.

## Conclusion

We respectfully submit that the Writ of Certiorari should be dismissed as to Fred M. Kirby as having been improvidently granted or, in the alternative, that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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February 21, 1966